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IN THE
COURT OF APPEALS OF INDIANA

VALERIE HEURING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0701-CV-25
	)	
ALL STAR CONSTRUCTION, INC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0306-PL-124

October 31, 2007

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Valerie Heuring appeals the jury verdict in favor of appellee-plaintiff All Star Construction, Inc. (All Star) on All Star's complaint for foreclosure of a mechanic's lien it held against Heuring's property. Heuring contends that All Star had released her from the debt underlying the lien, that the damages awarded to All Star were excessive, and that the award of attorney fees to All Star was excessive. She also argues that the jury awarded her inadequate damages on her counterclaim against All Star for breach of implied contract. Additionally, All Star has filed a motion seeking appellate attorney fees.

We conclude that All Star's release of Heuring was ineffective, inasmuch as it was conditioned on the sale of her lot to All Star and the sale did not occur. We also find, however, that the mechanic's lien did not attach to upgrades made to the residence located on the lot without Heuring's consent and remand with instructions to subtract $35,000 from the damages awarded to All Star, for a total award of $167,000. Furthermore, we conclude that the attorney fees awarded to All Star were not excessive, that the damages awarded to Heuring on her counterclaim were not inadequate, and that All Star is entitled to appellate attorney fees. Thus, we affirm in part, reverse in part, and remand with instructions to (1) subtract $35,000 from the damages award to All Star on the mechanic's lien for a total award of $167,000; and (2) determine the amount of appellate attorney fees to which All Star is entitled.

FACTS

At some point in the summer of 2000, Heuring became engaged to be married and purchased a lot in Hobart, planning to build a house on the lot where she and her future

husband would live. Among other entities, she solicited a bid for the construction of the home from All Star and its owner, James Kendig. Kendig created a preliminary proposal for a $200,000 construction project, but Heuring rejected that proposal because it was too expensive. On November 29, 2000, Kendig submitted a proposal to construct the residence for $152,000, and Heuring accepted that proposal.[1]

After Kendig and Heuring reached an agreement, Kendig hired subcontractors for some of the construction tasks, including concrete work to build an unfinished basement. The subcontract for concrete work was awarded to McComb Masonry Co, Inc. (McComb). All Star and its subcontractors began constructing the residence in May 2001 and Kendig told Heuring that construction would be complete in the fall of that year. Heuring and her fiancé were married in April 2001 and lived with her parents during construction. Heuring maintained property and builder's risk insurance while the home was being built.

As construction on the property commenced, the lot was excavated and McComb poured concrete walls on top of the foundation for the basement. Once that step was completed, the lot was partially backfilled and construction proceeded—the floor was laid, walls were constructed, the roof was built and covered with shingles, and windows and doors were installed. The basement and garage floors were poured and all of the electrical work was installed. As construction progressed, Heuring changed certain details and decided on certain upgrades, adding $15,000 to the agreed-upon cost of construction.

[1] Heuring did not sign the proposal but both parties agree that a contract was formed.

On August 25, 2001, Heuring returned from a family vacation and learned that the back wall of the house had collapsed. It had been very rainy and windy all day. Heuring called Kendig and asked him to come to the house. After he arrived, they observed that the basement wall in the back of the house had caved in and there were several feet of water in the basement. At trial, Kendig testified about their reactions:

> Well, Valerie was standing there, and I mean, she was devastated, and rightfully so. I was pretty devastated myself. You know, I told her, I said, Hey, I don't know what happened, but tried to reassure her that we'd take care of it, it would all work out it might take some time, but you know, we'll get it fixed.

Tr. p. 99.

The next morning, Kendig arrived at the lot with a crew of employees and started to shore up the collapsed wall. Kendig admits that following the collapse, the basement was exposed to the elements for at least three months, resulting in water standing in the basement on numerous occasions. The basement floor was destroyed and it was necessary to run a pump constantly to rid the basement of water. At some point, Heuring hired an engineer to examine the property and determine the cause of the collapse, and the engineer billed her $688 for his services.

In late October 2001, Heuring had an opportunity to buy another house. She told Kendig that she could not afford to own two homes, and he replied that he did not blame her for looking at other residences because it could take as much as a year to resolve the issues stemming from the collapsed wall and standing water. She asked Kendig to release her of any remaining obligations she might have regarding the property and he agreed, telling her that he would buy the lot, finish the house, and put it up for sale. Although Kendig agreed to

sign a release, Heuring did not contact him again with a document. Furthermore, Kendig and Heuring did not agree on a price for the lot; thus, Heuring still owns the lot and possesses the deed. Kendig testified that he has always been willing to pay Heuring the fair market value of the lot and that he made numerous attempts to learn Heuring's asking price for the lot but she refused to give him a value.

Heuring purchased the other home and closed on that property in March 2002. After Kendig "[a]bsolutely" released Heuring from her obligations, tr. p. 218, he made numerous changes and upgrades to the building plans, "doing things the way that I thought they should be done in order to make it more marketable," id. at 177. Among other things, Kendig finished the basement and installed a bathroom in the basement, neither of which were included in the proposal agreed to by Heuring. According to Kendig, "I really wasn't looking at well, I'm going to overspend what [Heuring]—I didn't even consider [Heuring] at that point, because she had bought another house, she was out. All I was thinking about was making it marketable." Id. at 182. Kendig's upgrades to the home cost approximately $35,000 to $40,000.

Construction was completed in March 2003 and Kendig contacted Heuring to express his desire to sell the home. She also hoped to put "this whole nightmare behind me," id. at 285-86, agreeing that the property could be sold as soon as they agreed upon the value of the lot prior to closing.

They were unable to reach an agreement on the value of the lot, however, and on June 11, 2003, All Star filed a complaint against Heuring and McComb,[2] seeking foreclosure on a mechanic's lien it had filed against Heuring's property on April 26, 2003. On June 25, 2003, Kendig received an offer to purchase the house for $207,500. Heuring refused to agree to the sale because of the pending lawsuit. On November 17, 2003, Heuring filed a counterclaim against All Star and a third-party complaint against Kendig for breach of express and implied contract based on the failure to purchase the lot from her. On March 13, 2006, Heuring hired a licensed appraiser to appraise the house and the lot. The appraiser valued the home at $145,000 and the lot at $35,000 and charged $275 for his services.

Following the collapse and throughout the litigation, Heuring has continued to maintain property and builder's risk insurance, totaling $3,586.11. She also paid electric and gas bills for the home in the total amount of $450.19. And when the property is sold, she will be responsible for 2002-2005 property taxes, which total $7,608.35.

Heuring requested a jury trial, which commenced on July 10, 2006. The jury returned a verdict in favor of All Star and against Heuring on the mechanic's lien, valuing the lien at $202,000. The jury also found in Heuring's favor on her counterclaim against All Star and awarded her $688 in damages.[3] All Star requested attorney fees and the trial court awarded fees in the amount of $27,609.16. Heuring now appeals and All Star requests appellate attorney fees.

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[2] Although All Star ultimately recovered $40,000 from McComb based on faulty construction, it did not recover the full cost of repairing the collapsed wall, which totaled $65,000.

[3] Apparently, the jury did not return a verdict on the third-party complaint against Kendig.

DISCUSSION AND DECISION

I. Foreclosure of the Mechanic's Lien

As we consider Heuring's arguments that the jury erroneously concluded that she was liable for the mechanic's lien and erroneously required her to pay the full value of the newly-constructed home, we observe that when, as here, the trial court has declined to set aside the verdict, we may not do so unless the verdict is wholly unwarranted under the law and the evidence. Ingersoll-Rand Corp. v. Scott, 557 N.E.2d 679, 684 (Ind. Ct. App. 1990).

As for an evaluation of damages awarded by a jury, our Supreme Court has explained that "[a] jury determination of damages is entitled to great deference when challenged on appeal," going on to describe the proper standard of review:

> "Damages are particularly a jury determination. Appellate courts will not substitute their idea of a proper damage award for that of the jury. Instead, the court will look only to the evidence and inferences therefrom which support the jury's verdict. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Thus, if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed."

Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453, 462 (Ind. 2001) (quoting Prange v. Martin, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994)). Thus, "'[w]e cannot invade the province of the jury to decide the facts and cannot reverse unless the verdict is clearly erroneous.'" Sears Roebuck, 742 N.E.2d at 462 (quoting Annee v. State, 256 Ind. 686, 690, 271 N.E.2d 711, 713 (1971)).

A. Release

A contractor may attach a mechanic's lien to real estate to recover its wages and costs. R.T.B.H., Inc. v. Simon Prop. Group, 849 N.E.2d 764, 766 (Ind. Ct. App. 2006), trans. denied; see also Ind. Code § 32-28-3-1. In Indiana, "mechanic's liens are purely statutory creations and in derogation of the common law. The legislature has determined that, when labor or materials are provided to improve real estate, money damages, the remedy at law, are inadequate." Clark v. Hunter, 861 N.E.2d 1202, 1209 (Ind. Ct. App. 2007) (internal citation omitted). A valid mechanic's lien requires the existence of a debt which, under the statute, it secures, and the debt must arise out of an express or implied contract. PCL/Calumet v. EnterCitement, LLC, 760 N.E.2d 633, 637 (Ind. Ct. App. 2001).

Here, the evidence establishes that there was a contract between Heuring and All Star for the construction of a house on her lot. Furthermore, Heuring owed All Star money for labor and materials based on that contract. Heuring argues, however, that Kendig released her from that debt. Consequently, she insists that the mechanic's lien is not valid and she cannot be held liable thereon.

Although Kendig admitted that he released Heuring from her debt, the undisputed evidence in the record establishes that the consideration for that release was Heuring's agreement to sell and deed the lot to All Star. Despite the jury's conclusion that All Star breached its contract with Heuring to purchase the lot, it is undeniable that there was no meeting of the minds regarding the price[4]—indeed, they continue to argue about price on

[4] All Star does not cross-appeal the jury's verdict on Heuring's counterclaim.

appeal—and that as a result, the sale did not occur. Having evaluated the evidence, the jury found that notwithstanding All Star's breach, Kendig's release of Heuring's debt was ineffective. We will not second-guess that conclusion and decline to find that Kendig released Heuring from her debt.

Heuring also argues that the parties' conduct demonstrates a mutual rescission of the contract. The "function of contract rescission is to return the parties to their pre-contract position, that is, the status quo." Horine v. Greencastle Prod. Credit Ass'n, 505 N.E.2d 802, 805 (Ind. Ct. App. 1987). Here, since the time of contracting, All Star has built a house on Heuring's lot. Heuring has neither made any payments on the house nor sold the lot to All Star. Thus, whatever the parties' conduct may have been, it is impossible to conclude that a rescission of the contract occurred because neither party has been returned to the status quo. Under these circumstances, we find that the jury properly found that the mechanic's lien was valid and Heuring was obligated to pay for at least a portion of the construction of the house.

B. Damages

Heuring argues that even if the lien is valid and enforceable, the damages award was excessive.[5] The jury awarded All Star $202,000, which is the amount Kendig testified he had incurred in costs associated with the construction of the home. The undisputed evidence, however, establishes that Kendig made a number of upgrades and improvements to the house

[5] To the extent that Heuring argues that the award was excessive because it fails to take McComb's defective workmanship into account, we observe that All Star was not seeking compensation from Heuring for the costs stemming from the wall collapse. Indeed, All Star recovered $40,000 from McComb for the defective workmanship and absorbed the remaining costs of repair, which totaled $25,000. Tr. p. 55, 98-99, 223-33. Consequently, this is not a valid reason to conclude that the jury's award was excessive.

without Heuring's consent. The cost of these upgrades was $35,000 to $40,000. We observe that, as a matter of law, for a mechanic's lien to attach to real estate,

> it is imperative that improvements to the property be made under the authority and direction of the landowner and something more than inactive or passive consent is required. . . . Without the land owner's active consent, a lien claimant can only maintain a lien to the extent of his customer's interest in the land.

R.T.B.H., 849 N.E.2d at 766. Here, Kendig testified that he did not seek Heuring's consent to the construction upgrades. Tr. p. 182. Thus, the undisputed evidence establishes that Heuring neither actively, inactively, nor passively consented to those changes. As a matter of law, therefore, the mechanic's lien did not attach to those upgrades. We remand, therefore, with instructions that the trial court use its power of remittitur and subtract $35,000 from the mechanic's lien award, for a total award of $167,000.

C. All Star's Attorney Fees

The mechanic's lien statute mandates the award of reasonable attorney fees upon foreclosure on the lien. Clark, 861 N.E.2d at 1209. The determination of what amounts to reasonable attorney fees in an action to enforce a mechanic's lien is generally a question of fact. Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 102 (Ind. Ct. App. 1999). Because of the factually sensitive nature of the determination, the trial court has a great deal of discretion in arriving at a decision. Id. Thus, we will only reverse if there is a total lack of supporting evidence or the evidence is undisputed and leads solely to a contrary conclusion. Id. The fee award should be reasonable in relation to the amount of the judgment to avoid discouraging property owners from challenging a lienholder's defective work for fear of excessive attorney fees. Id.

Here, the trial court awarded attorney fees to All Star in the amount of $27,609.16. Heuring essentially argues that foreclosure of a mechanic's lien is "not overly complex," appellant's br. p. 24, that All Star was unnecessarily represented at trial by two attorneys, and that the attorneys' work at trial and post-trial must have been somewhat duplicative. These arguments do not establish a total lack of supporting evidence of the award, nor do they lead us to find that the evidence is undisputed and leads solely to a contrary conclusion. Instead, Heuring is asking us to invade the province of the trial court as factfinder—a request we decline. We also note that when compared to the reduced judgment of $167,000, the fee award represents 16.5% of the total award, which is reasonable and will not deter future property owners from challenging defective work. Thus, we find that the trial court did not abuse its discretion in calculating the amount of attorney fees owed to All Star.

II. Damages Award on Heuring's Counterclaim

Heuring next argues that the damages award on her counterclaim against All Star was inadequate. In considering whether damages awarded by a jury are inadequate as a matter of law, we apply the same rules as if the judgment had been challenged as excessive. Lindenborg v. M & L Builders & Brokers, Inc., 158 Ind. App. 311, 322, 302 N.E.2d 816, 822 (1973). Thus, we will reverse only if it is apparent that the amount is so small as to indicate that the trier of fact was motivated by prejudice, passion, partiality, or corruption or considered some improper element in arriving at its assessment. Id. Put another way, we will affirm the award if it is within the scope of the evidence before the trial court. Randles v. Ind. Patient's Comp. Fund, 860 N.E.2d 1212, 1230 (Ind. Ct. App. 2007), trans. denied.

Here, the jury found that All Star breached its contract with Heuring and awarded her $688 in damages. Heuring argues that she is entitled to a greater damages award, directing our attention to property taxes, electricity and gas bills, insurance premium payments, and charges from various mold remediation experts that she has incurred since owning the property. The verdict, however, is within the scope of the evidence, and we cannot conclude that it is inadequate as a matter of law.[6]

III. Appellate Attorney Fees

Finally, All Star requests appellate attorney fees. As noted above, All Star is statutorily entitled to reasonable attorney fees. Clark, 861 N.E.2d at 1209. And this court has held that "a statutory provision entitling a party to 'reasonable attorney fees' includes appellate attorney fees." Mullis v. Brennan, 716 N.E.2d 58, 66 (Ind. Ct. App. 1999). Thus, we remand to the trial court for a determination of All Star's appellate attorney fees generated in this appeal.[7]

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to (1) subtract $35,000 from the damages award to All Star on the mechanic's

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[6] Heuring also argues that she is entitled to $35,000, which is the amount her licensed appraiser concluded represents the value of the lot. Inasmuch as Heuring still possesses the deed, she would have received a windfall if the jury had calculated damages in this fashion. And to the extent she impliedly requests that we order specific performance of the contract for the sale of the lot, we decline to do so for a number of reasons, including the fact that the parties never reached a meeting of the minds on the price of the lot. We will not insert such a major term into the contract.

[7] We acknowledge that All Star has submitted a petition for appellate attorney fees to this court that includes the amount of fees to which it argues it is entitled. As noted above, however, the calculation of reasonable attorney fees is generally a question of fact. Abbey Villas, 716 N.E.2d at 102. Inasmuch as the trial court is better suited to answer questions of fact, we remand this matter to the trial court so that it may determine the amount of reasonable appellate attorney fees to which All Star is entitled.

lien for a total award of $167,000; and (2) determine the amount of appellate attorney fees to which All Star is entitled.

SHARPNACK, J., concurs.

RILEY, J., concurs in result.